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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

Estate of FREDERICK W. WILLIAMS, Deceased.	
LAURA SAMPSON, Petitioner and Respondent, v. VILMA PERAZA WILLIAMS, Objector and Appellant.	A092090 (San Francisco County Super. Ct. No. 270997)

Objector and appellant Vilma Peraza Williams (appellant) appeals from an order refusing to admit a December 9, 1995, will to probate and determining that under Probate Code section 259 appellant predeceased the testator/decedent Frederick W. Williams (decedent). The order was based on objections of petitioner and respondent Laura Sampson (respondent) that the will was procured through undue influence exerted by appellant. An alternative theory was that even if the will was valid, appellant was precluded from inheriting under the will by Probate Code section 259.

Appellant contends: (1) The evidence does not support a presumption of undue influence, (2) the trial court applied Probate Code section 259 before the section became law, and (3) appellant's trial counsel should have been recused. We affirm.

I. FACTS

Because the parties' testimony is so very contradictory, we will first state the rules governing our evaluation of the factual record. " 'The rules of evidence, the weight to be accorded to the evidence, and the province of a reviewing court, are the same in a will contest as in any other civil case.' [Citation.]" (*Estate of Evans* (1969) 274 Cal.App.2d 203, 211.) Thus, we are mandated by the substantial evidence rule to set out a statement of facts which accepts as true all evidence supporting the trial court's order and rejects all contrary evidence. (*Estate of Jamison* (1953) 41 Cal.2d 1, 13; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874.)

Decedent was an African-American born in Panama, who lived in a house he owned in San Francisco and had bank accounts totaling over $200,000.[1] In 1994, after a long marriage, his first wife, Leticia Williams, died at the age of 80. Decedent was also approximately 80 years old at the time of her death. There were no surviving children of decedent's first marriage.

All of decedent's relatives lived in Panama, except for respondent who was his niece and lived in Columbus, Georgia with her three children. Respondent's mother was decedent's sister. As a child, respondent visited decedent in Panama. Over the years, decedent maintained communication with his family in Panama. Christmas cards were regularly exchanged by respondent and decedent.

Respondent moved to the United States when she married a man in the United States military service. In approximately 1987, respondent moved to Columbus, Georgia. In 1989, respondent had communication with decedent when her husband was stationed at Fort Ord. It appears that the marriage ended and that respondent supports herself and her children by working as a bank teller coordinator.

In 1993, decedent telephoned respondent to inform her that his first wife was "really sick." They had not seen each other for about 15 years but had talked over the

[1] An order confirming a sale of the house for $345,500 was filed on March 20, 2000.

telephone. In 1994, decedent advised respondent that his first wife died. Respondent's brother, Carlos Speid, traveled from Panama to San Francisco to assist with the cremation. Arrangements were made for Margarita Basila, a woman who met decedent's family in church and lived in San Francisco, to help decedent.

Early in 1994, decedent met appellant, who was approximately 40. At that time, decedent had a bank account at Bay View Federal Bank where appellant worked as a teller. After decedent's first wife died and in June 1994, appellant accepted an offer to perform household work and to cook for him for a salary of about $900 per month.

Appellant learned that decedent owned his house, had no children, was from Panama where most of his relatives lived and had no relatives in the Bay Area. Early in 1995, appellant began a romantic relationship with decedent. Appellant continued to work for decedent for her salary. In addition appellant received gifts.

On February 20, 1995, appellant summoned paramedics to decedent's house because decedent was in agony. When appellant left the room, decedent told the paramedics he was faking because he needed help from appellant. Decedent was taken to the emergency room at Kaiser Hospital. Appellant told the paramedics that decedent's bills were not being paid and decedent was accusing her of stealing. Decedent had sufficient funds for his bills to be paid. Part of appellant's duties was to pay the bills.

Between March and July 1995, money was transferred to appellant from decedent's bank accounts. Appellant opened a joint bank account for herself and decedent by signing decedent's name. Appellant testified that decedent asked her to sign because he had a cramp in his hand and that he agreed to all the other transfers.

In June 1995, decedent telephoned respondent and asked her to come to San Francisco. Decedent stated that he needed respondent because appellant "was coming around his house and saying that she was helping him, but she was taking his money." Respondent arrived at decedent's house on August 30 or 31, 1995, and he was overjoyed to see her.

The following day, decedent stated that appellant had stolen $20,000 and respondent verified from the bank that appellant had withdrawn such amount by signing

decedent's name. Later in the day, appellant came to decedent's house and respondent asked about the $20,000. "[Appellant] stated that [decedent] had gave it to her. And [decedent] was saying that he did not give her no money. And then [appellant] start saying, well, I do remember I have been doing oral sex to you." Appellant discussed the sex in some detail. Respondent ordered appellant to leave. At the trial, appellant denied mentioning oral sex.

While in San Francisco, respondent performed various tasks at the request of decedent. She paid decedent's bills, purchased food for him, arranged for burial of his first wife's ashes and gave his first wife's clothes to charity. Also, to comply with decedent's request to protect him from appellant, respondent arranged for an attorney to prepare a will, living trust and power of attorney for decedent. All three documents were executed on September 5, 1995. The will left decedent's estate to respondent and two other relatives. Nothing was left to appellant. The power of attorney for decedent was given to respondent. At no time did respondent ever use the power of attorney.

Decedent and respondent agreed on a course of action to best protect him from appellant. Decedent would live with respondent in Georgia on a trial basis. The bank accounts in San Francisco were closed and the money transferred to Georgia. At least one account required a joint signature of decedent and respondent for withdrawals. Many of decedent's personal papers were moved to Georgia. Although decedent had his own room and freedom to move about, he felt isolated at respondent's home in a small Georgia city and missed San Francisco. After three to four weeks, he returned to his house.

On one occasion in Georgia, decedent wanted to go outside wearing only pajamas. Respondent was at work and her son telephoned her for advice. Since respondent lived in a "very quiet neighborhood," she told her son to prevent decedent from leaving the house in his pajamas. Decedent created a disturbance at a window. The police were called and decedent was taken to a hospital. Respondent brought decedent back to her house. At no time did decedent tell the police he was being held prisoner. Appellant presented

different evidence about this incident, including that decedent claimed he was being imprisoned in respondent's house.

After decedent returned to San Francisco in early October 1995, appellant resumed contact with him. Within five days of decedent's return, appellant changed his phone number to an unlisted one and started moving decedent's money back to accounts in San Francisco. From the fall of 1995 through 1997, respondent telephoned appellant to talk to decedent at least twice a month. Appellant always told respondent that decedent was doing fine and did not want to talk to her or to any of his relatives. In October 1995, appellant obtained a final decree of dissolution for her second marriage.

In November 1995, respondent's father died in Panama. Respondent pleaded with appellant to be allowed to talk to decedent to ask for money to travel to Panama for the funeral. After respondent talked to decedent, appellant telegraphed money for the funeral, but also asked respondent to release the approximately $14,000 in an account in the Bank of America. Respondent declined to do so.

On November 11, 1995, appellant brought decedent to the Kaiser Hospital emergency room. Appellant told Kaiser that decedent was in pain from stress caused by his niece taking all his money. A referral was made for a psychiatric examination, but no examination was ever conducted.

On November 25, 1995, appellant brought decedent to the office of attorney Malcolm J. Rainsford. There was a second interview between decedent and Rainsford on December 2, 1995. Decedent stated that he wanted to revoke his will of September 5, 1995, and draft a new will leaving everything to appellant. Rainsford testified that appellant expressed great hostility toward respondent.

On December 5, 1995, appellant and decedent were married. The marriage was certified as a "confidential marriage" and was performed by a friend of appellant. A man who was appellant's "best friend" and landlord was the only witness. Neither respondent nor decedent's other relatives were informed of the marriage. On December 9, 1995, decedent executed the will in issue in the case at bench. At the insistence of Rainsford,

decedent left $10,000 each to respondent and another relative to avoid "asking for trouble." Otherwise, decedent's entire estate was given to appellant.

In 1996, respondent needed additional funds to pay for her son's college and other expenses. Respondent asked appellant if decedent could loan her some money. Appellant sent a total of $4,000, which respondent planned to pay back when she had sufficient resources. On March 22, 1996, in Rainsford's office, decedent signed a document revoking the living trust of September 5, 1995. Appellant transmitted the living trust document and brought decedent to Rainsford's office.

In June 1996, appellant's name was added to decedent's $200,000 certificate of deposit, which had been moved from Georgia, and appellant began withdrawing cash from the account. In January 1997, the remaining $160,000 was transferred by appellant into her personal mutual fund. Decedent was named beneficiary if appellant should die.

On July 6, 1997, appellant made a complaint to the police against her second husband. The police were summoned to a location which was not decedent's house. Appellant told the police that she "had a second job at [decedent's home] working for an elderly man." During the marriage, appellant would list decedent's house and another address as her residence.

In September 1997, the police and paramedics were called to decedent's house because decedent was screaming out of an upstairs window. The paramedics found decedent in an agitated state with no food in the house and the oven turned on with an unlit pilot light. Decedent's wallet was missing and he referred to appellant as a "banker/'friend' who he thinks is taking his $." A September 14, 1997, report of a Kaiser social worker stated that appellant reported "she is [decedent's] wife . . . . She doesn't live with him because she is afraid of him." Further, appellant stated that attorney Rainsford suggested that she marry decedent so she could manage decedent's finances and have total control as to his care.

At the behest of Kaiser and on September 25, 1997, decedent became a resident at the Sunset Gardens Board and Care Home for the Elderly. Appellant was opposed to

moving decedent to the facility, even though he was incontinent. Decedent resided at Sunset Gardens for the remainder of his life.

In April and May 1998, Suzanne Beers, a psychiatric social worker for Kaiser, spoke with decedent on three occasions. At the first interview, decedent referred to himself as a widower and talked exclusively about his first wife. No mention was made of appellant. In the second interview, decedent stated he did not agree to be married to appellant and did not know where his money was going. Beers attempted to contact appellant, but was told appellant was out of the country. Decedent never told Beers that respondent was taking his money. Beers also administered a "depression test" to decedent. The test indicated that decedent was depressed. Kaiser medical records diagnosed that decedent had "memory deficit," "moderate dementia" and "a tendency to paranoia."

Based on all the data before her, Beers "thought there was possible financial abuse and emotional abuse occurring." Beers expressed her concerns to the police, public guardian, ombudsman and owner/administrator of Sunset Gardens. Proceedings to institute a conservatorship were commenced by Beers, but were not completed before decedent died.

Appellant did not advise respondent or decedent's other relatives that decedent was moved to Sunset Gardens. In June 1998, respondent received a letter from the fraud detail of the San Francisco Police Department. The letter stated that decedent was the subject of a current "investigation concerning a case of Financial Elder Abuse" and asked respondent to contact the police.

Respondent telephoned the police and was advised for the first time that decedent was in Sunset Gardens. When respondent telephoned appellant, she was told that it was none of her business where appellant placed her husband. This was the first time respondent learned of the marriage. Respondent telephoned decedent at Sunset Gardens and regularly spoke to him until his death. Decedent always complained that appellant was stealing his money. Respondent relied on the police to remedy the situation.

On September 25, 1998, decedent died. Appellant immediately advised respondent of the death, but refused to delay cremation of the body until respondent and other relatives could travel to San Francisco.

Appellant presented evidence that decedent voluntarily chose to leave the bulk of his estate to her and that respondent was only interested in decedent for his money. In addition, decedent approved of all transfers of his money to appellant, was not coerced by her in any way and disliked all his relatives.

II. SUBSTANTIAL EVIDENCE

Appellant contends: The evidence presented at trial is insufficient to find that appellant actively participated in the procurement of the will or unduly profited by the terms of the will. This contention lacks merit.

" 'As a general proposition, California law allows a testator to dispose of property as he or she sees fit without regard to whether the dispositions specified are appropriate or fair. [Citations.] Testamentary competence is presumed. [Citations.]' [Citation.] The presumption can be overcome if it is shown that the testamentary act was the product of undue influence [citation], but the strictness of the rules for proof of undue influence reflects the strength of the presumption in favor of the will . . . ." (*Hagen v. Hickenbottom* (1995) 41 Cal.App.4th 168, 181-182.)

" ' "Proof, to establish undue influence, must be had of a pressure which overpowers the mind and bears down the volition of the testator at the time the will is made. It consists in the exercise of acts or conduct by which the mind of the testator is subjugated to the will of the person operating upon it [citations]. Mere proof of opportunity to influence a testator's mind, even when coupled with an interest or motive to do so, will not sustain a finding of undue influence in the absence of testimony showing that there was a pressure operating directly on the testamentary act and to such an extent as to affect the terms of the testament. [Citations.]" ' " (*Estate of Bould* (1955) 135 Cal.App.2d 260, 269.)

"The difficulties of proof of undue influence in circumstances such as these are taken into account in the rule that certain foundational facts will activate a *presumption* of

undue influence which, at trial, would operate to shift the burden of proof to the proponent of the trust or will. [Citation.]" (*Hagen v. Hickenbottom, supra*, 41 Cal.App.4th at p. 187.)

In *Estate of Sarabia* (1990) 221 Cal.App.3d 599, this court defined the presumption of undue influence. "A person contesting a will on this ground is aided by a presumption of undue influence if the contestant produces evidence that the beneficiary (1) had a confidential relationship with the decedent (2) was active in procuring the will and (3) 'unduly' profited from it." (*Id.* at p. 603.)

"The presumption of undue influence arises only if *all* of the [above] elements are shown . . . . If this presumption is activated, it shifts to the proponent of the will the burden of producing proof by a preponderance of evidence that the will was not procured by undue influence. It is for the trier of fact to determine whether the presumption will apply and whether the burden of rebutting it has been satisfied. [Citations.]" (*Estate of Sarabia, supra*, 221 Cal.App.3d at p. 605.) While generally it is not useful to compare factually other will contest cases because of the variation in existence and degree of the factors involved, nevertheless the factual pattern in other cases can sometimes be quite helpful. (*Estate of Jamison, supra*, 41 Cal.2d at p. 10.)

In the instant case, appellant conceded that the first element of undue influence was established since she was the wife of decedent at the time the December 9, 1995, will was executed. The concession is supported by substantial evidence. (*Estate of Fritschi* (1963) 60 Cal.2d 367, 374.)

"Directing our attention to the second element, i.e., whether the proponents, or any of them, actively participated in the preparation of the will, we note that such activity may be established by inference, that is, by circumstantial evidence. [Citations.]" (*Estate of Gelonese* (1974) 36 Cal.App.3d 854, 865.) To rebut the presumption, the proponent must prove that she took no unfair advantage and that she reminded decedent of the natural objects of his bounty. (*Estate of Clegg* (1978) 87 Cal.App.3d 594, 603.)

"The mental and physical conditions of a testator are factors to be considered on the issue of undue influence. [Citation.]" (*Estate of Robbins* (1959) 172 Cal.App.2d 549,

553.) Nieces and nephews are not necessarily the natural object of an uncle's bounty. The actual relationship between the testator, proponent and contestant is the more significant factor. Influence gained through kindness and affection is not regarded as "undue" when no imposition or fraud is practiced. (*Estate of Mann* (1986) 184 Cal.App.3d 593, 606-607.)

Active procuration of a will is not established merely by evidence that the proponent retained the attorney who drafted the will or was present at the execution of the will. (*Estate of Wright* (1963) 219 Cal.App.2d 164, 170.) Two factors that give rise to an inference of active procuration are that at the time of execution of the will, the decedent was being cared for exclusively by the proponent who prevented contact between decedent and his relatives. Statements by the decedent can also be considered. (*Estate of Gelonese, supra,* 36 Cal.App.3d at p. 865.) Overall, the evidence must indicate that the will was made at the instigation and request of the proponent or that decedent was not acting entirely in accord with his own desire. (*Estate of Bould*, *supra*, 135 Cal.App.2d at p. 275.)

In the instant case, the record contains substantial evidence that through various means appellant became the exclusive caregiver for decedent and controlled access to his person and money at the time the will was executed. Throughout their relationship, appellant transferred decedent's money to herself. The marriage expedited her efforts. Decedent made repeated statements that appellant was stealing his money. Appellant made all the arrangements for the will and the nullification of the legal documents benefiting respondent and decedent's relatives. The observations of Kaiser Hospital and psychiatric social worker Beers reflect that decedent's mind had been weakening at the time the will was executed.

Taken as a whole, this evidence gives rise to an inference that appellant isolated decedent, overpowered his mind, and as part of her scheme to take all decedent's assets, actively procured the will of December 9, 1995. Any contrary evidence or inferences were properly disregarded by the trial court. (*Bowers v. Bernards*, *supra*, 150 Cal.App.3d at pp. 873-874.)

With regard to the third or undue profit element, we held in *Estate of Sarabia, supra,* 221 Cal.App.3d at page 607: "To determine if the beneficiary's profit is 'undue' the trier must necessarily decide what profit would be 'due.' These determinations cannot be made in an evidentiary vacuum. The trier of fact derives from the evidence introduced an appreciation of the respective relative standings of the beneficiary and the contestant to the decedent in order that the trier of fact can determine which party would be the more obvious object of the decedent's testamentary disposition. [Citation.] That evidence may include dispositional provisions in previous wills executed by the decedent [citation], or past expressions of the decedent's testamentary intentions. [Citation.]"

Undue benefit is indicated when the will does not treat all of the decedent's relatives equally and the record contains evidence, even if in conflict, that decedent wanted his relatives to share equally in his estate. (*Estate of Gelonese, supra,* 36 Cal.App.3d at p. 866.) An unusually large bequest to one person is also strong evidence of an undue benefit. (*Estate of Baker* (1982) 131 Cal.App.3d 471, 480-481.) However, the issue is not resolved solely by the determination of whether the provisions of a will were "natural" or "unnatural." (*Estate of Peters* (1970) 9 Cal.App.3d 916, 921.)

In the instant case, substantial evidence indicates that decedent had a good relationship with respondent and his other relatives before appellant took control of his life. Indeed, decedent attempted to escape from appellant by going to live with respondent. However, the attempt was unsuccessful because he missed San Francisco. A past will and statements of decedent disclose that he would have left his estate to his relatives but for the influence of appellant.

Accordingly, the record contains substantial evidence that appellant unduly profited from the will she actively procured by virtue of her confidential relationship with the decedent and undue influence is established.

III. PROBATE CODE SECTION 259

Appellant contends: "The trial court erroneously applied Probate Code section 259 to the present case in that the section was approved by the Governor on September

28, 1998 and became law on January 1, 1999, and decedent died on September 25, 1998." We express no opinion on this issue because it is moot.

During the trial, the judge defined the issues for the parties as follows: "Here is what's relevant. [Appellant's counsel] put in evidence of due execution, the burden shifted to [respondent's counsel]. He thinks he has made out a case of undue influence and probably thinks he has made out a case to clear and convincing evidence of at least *fiduciary abuse as required by [Probate Code section] 259, which would if it applied prevent [appellant] from inheriting even if the will was good . . . .*" (Italics added.)

At the close of the trial, respondent argued: "And I would ask the court to invoke [Probate Code section 259]. *In the alternative*, I would ask you to find undue influence and deny probate to the December '95 will." (Italics added.)

The final order of the trial court provided: "Having found that the December 9, 1995 will was procured by undue influence on the part of [appellant] . . . , [¶] THIS COURT hereby refuses to admit the December 9, 1995 will to probate. [¶] Having found by clear and convincing evidence that [appellant] committed elder abuse under Probate Code section 259 . . . , [¶] THIS COURT hereby orders that [appellant] be, and hereby is, deemed to have predeceased the decedent to the extent provided in Probate Code section 259, subdivision (c)."

"An appellate court will not review questions which are moot and which are only of academic importance. It will not undertake to determine abstract questions of law at the request of a party who shows that no substantial rights can be affected by the decision either way. [Citations.]" (*Keefer v. Keefer* (1939) 31 Cal.App.2d 335, 337.) An appellate court does not express an opinion on a question that is found to be moot. (*Security-First Nat. Bk. v. O'Connor* (1937) 18 Cal.App.2d 592, 595 (Supreme Ct. opn. denying hearing).)

In the instant case, respondent challenged appellant's right to inherit under the December 9, 1995, will on two separate alternative grounds: undue influence and Probate Code section 259. The trial court defeated appellant's claim to inherit by refusing to probate the will on the grounds of undue influence. Therefore, no substantial

rights are affected by the additional ruling pursuant to section 259. Accordingly, we find that the present issue is moot and express no opinion on the merits of the issue.

IV. ATTORNEY TESTIFYING

Appellant contends: "The [trial] court erroneously allowed Rainsford and Hall to represent appellant at trial although Rainsford drafted and witnessed the will and Hall witnessed the will." This contention lacks merit.

The trial began as follows: "Mr. Rainsford: Malcolm Rainsford for [appellant]. Christopher Hall is associated and Frank D'Alfonsi is associated. [¶] . . . [¶] Your Honor, it's a limited association because I thought it better if an outside attorney questioned me rather than Chris Hall. [¶] The Court: All right. This will just be for your role in the signing and preparation? [¶] Mr. Rainsford: Yes, because I have to take the stand. [¶] The Court: Any objection to that? [¶] [Respondent's counsel]: No, your Honor." Both Rainsford and Hall testified favorably to appellant. D'Alfonsi questioned Rainsford and did not testify himself.

Under current rule 5-210 of the Rules of Professional Conduct governing attorneys as witnesses, the trial court " 'still has discretion to order withdrawal of counsel in instances where an attorney or a member of the attorney's law firm ought to testify on behalf of his client. The amended rule, however, changes the emphasis which the trial court must place upon the competing interests, in reaching its decision. Under the amended rule . . . , the trial court, when balancing the several competing interests, should resolve the close case in favor of the client's right to representation by an attorney of his or her choice and not . . . in favor of complete withdrawal of the attorney. Under the present rule, if a party is willing to accept less effective counsel because of the attorney's testifying, neither his opponent nor the trial court should be able to deny this choice to the party without a convincing demonstration of detriment to the opponent or injury to the integrity of the judicial process.' [Citations.]" (*Smith, Smith & Kring v. Superior Court* (1997) 60 Cal.App.4th 573, 579.)

" 'An appellate court will ordinarily not consider procedural defects or erroneous rulings . . . where an objection could have been, but was not, presented to the lower court

by some appropriate method. [Citations.]' [Citation.] Failure to object to the ruling or proceeding is the most obvious type of implied waiver. [Citation.]" (*In re Marriage of Hinman* (1997) 55 Cal.App.4th 988, 1002.)

"The doctrine by which an appellate court in its discretion may refuse to consider an argument not raised below is premised on the assumption that 'it is *unfair to the trial judge and to the adverse party* to take advantage of an error on appeal when it could easily have been corrected at the trial.' [Citation.] The rule is limited to matters involving errors which could have been cured in the trial court . . . ." (*Flores v. Natividad Medical Center* (1987) 192 Cal.App.3d 1106, 1117.)

In the instant case, no party or attorney objected to Rainsford's and Hall's testifying or representing appellant. Moreover, nothing in the record indicates that appellant had any reservations about her attorneys' choices. The failure to object prevented the trial court from exercising its discretion by balancing all the potentially competing interests. Accordingly, we exercise our discretion to refuse to consider the argument raised for the first time on appeal.

V. DISPOSITION

The order is affirmed. Costs are awarded to respondent.

_____
REARDON, Acting P.J.

We concur:

_____
SEPULVEDA, J.

_____
KLINE, J.*

* Presiding Justice of Division Two of the First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.